Filed 6/7/10 Trotman v. Southern California Edison Co. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LEE TROTMAN, Plaintiff and Appellant, v. SOUTHERN CALIFORNIA EDISON COMPANY et al., Defendants and Respondents. .	B215903 (Los Angeles County Super. Ct. No. BC 384055)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Joanne O'Donnell, Judge. Affirmed.

Law Offices of Lisa L. Maki, Lisa L. Maki and Christina M. Coleman for Plaintiff and Appellant.

John D. Buchanan and Jenny Sievers for Defendants and Respondents.

SUMMARY

Lee Trotman sued his employer, Southern California Edison Company, and three of his superiors at the company (collectively, SCE or the employer), asserting causes of action for racial discrimination, harassment, and retaliation, among others. Trotman, who is of Korean and West Indian descent and had worked in SCE's marketing department, alleged that an 18-month temporary assignment to a different department for a specific project was a demotion, and that he was both demoted and subjected to a hostile work environment based on his race or national origin. He also claimed that his temporary assignment was made in retaliation for his complaints of harassment and his whistle-blowing activities.

The trial court granted SCE's motion for summary adjudication of Trotman's claims, finding that (1) Trotman could not demonstrate that he suffered any adverse employment action, (2) the alleged racial harassment was too trivial to be actionable, and (3) the decision makers responsible for Trotman's temporary assignment were unaware of his alleged whistle-blowing activities when they made the assignment. Finding no error in the trial court's conclusions, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

These are the material facts, undisputed by any admissible evidence. Trotman began working for SCE in late 1997 or early 1998 as a project manager (or a "channel marketing manager"). In February 2001, he was placed on a temporary assignment in the energy efficiency department as a program contract manager. In September 2002, he began working as a project manager in what is now called the customer experience management department, reporting to Julie Rowey. Rowey reported to Seth Kiner, the director of the department. In October 2005, Trotman began reporting to Melodee Black. Black reported to Rowey, who in turn reported to Kiner. During the period September 2002 to early 2006, Trotman had contact with Kiner "maybe twice a week, once a week."

1. Trotman's February 2006 grievance claiming race discrimination.

In February 2006, Trotman filed a grievance with the company alleging that, in years past, Kiner had given him undesirable work assignments, influenced others to reduce his performance evaluation scores, engaged in hostile behavior and actions toward Trotman resulting in a drastic reduction in advancement and promotion opportunities, and singled out Trotman for race-based reasons. Trotman, citing incidents dating back to 2000, characterized his grievance as being "about enduring six years of Seth Kiner's racist and retaliatory treatment." In his first amended complaint, Trotman alleged he is bi-racial, West Indian and Korean, but SCE classified Trotman as "African American" in its human resources system.

Trotman's grievance stated that, in August 2005, a former SCE employee, Leslie Diaz, told him that, several years earlier, Kiner had referred to Trotman as a "Nigook" when he learned that Trotman's father was Black and his mother was Korean. (And, while he did not so state in his grievance, Trotman later testified that another employee, Sheila Lee, told him, in December 2005 or January 2006, that Kiner had once used the term "Nigook" in Trotman's presence, but Trotman did not hear it.) Also, Trotman alleged that, at an off-site SCE function, Kiner performed a parody of a Hawaiian dance, while saying "'ooga booga,'" that Trotman found offensive; this incident occurred prior to 2001 and lasted a "few seconds."

Keith Dobson of SCE's equal opportunity department investigated Trotman's allegations and interviewed 18 witnesses, many of whom reported to Kiner. Several witnesses Dobson interviewed had negative things to say about Kiner, including that Kiner made inappropriate racial comments. "A number of those interviewed said Mr. Kiner would yell at individuals or behave in an unprofessional manner towards some individual." Kiner yelled at Trotman in August of 2000 and yelled at another employee about Trotman in September 2000. Kiner had a verbal disagreement with an African-American, Jacqueline Jones, during a meeting in 2001, raising his voice and saying, "If you'd shut up, I'll tell you." Steve Culbertson said he overheard Kiner on

the telephone in 2000 saying, in a demeaning tone and raised voice, that "I should have fired him [Trotman] when I had the chance," but Culbertson also told Dobson that Kiner "has a problem with being respectful towards people" and Kiner "might be disrespectful towards anyone, regardless of race." Indeed, several witnesses said Kiner made inappropriate comments about his own wife and children. Dobson found that some witnesses he interviewed supported Trotman's claim that Kiner treated him unfairly, while others did not, and those witnesses who supported Trotman's claim also said Kiner treated unfairly others who were not African American. Dobson also stated that many of the witnesses who told him Kiner had made inappropriate racial comments in years past "were involved in past conflicts with Kiner."

Dobson stated that his investigation "did not uncover any evidence of racial discrimination nor did I identify a single instance of where Kiner treated Trotman unfairly." Dobson's report, dated February 29, 2006, concluded that: "[I]t appears that Mr. Kiner probably violated the Company EO policy by making inappropriate racial comments," but "the policy violations would have occurred at least three years ago, as none of the examples shared during the investigation are newer than that." Dobson stated further, "It is evident that some of Mr. Kiner's employees feel he favors some employees over others; in fact, that he dislikes some of his employees. And it appears that Mr. Kiner and Mr. Trotman do not get along, with Mr. Trotman probably feeling the worse of the relationship, as he is in the subordinate position. However, the investigation did not find specific incidents where Mr. Kiner treated Mr. Trotman unfairly." And, no evidence was found that Kiner gave Trotman unreasonable assignments or forced Rowey or Black to give Trotman low performance evaluation scores.

After the grievance and investigation in February 2006, Trotman continued in the same position, reporting to Black.

2. Trotman's "whistle-blowing" complaints in late September and October 2006.

Trotman had been put in charge of managing the "summer discount plan" in 2004 or 2005, while reporting to Rowey. His assignment included overseeing the marketing materials that were being provided by DDB Worldwide (DDB), an outside vendor in charge of advertising and marketing certain customer programs and services. Trotman had been in charge, or was the "lead," of the team that selected DDB as SCE's primary vendor; DDB was selected because it "demonstrated far superior expertise and strategic thinking than its competitors." Trotman was initially satisfied with DDB, but said he began experiencing problems with its work in the summer of 2005. DDB began making multiple printing errors on SCE's marketing materials. Trotman admitted he was partially responsible for some of the errors made by DDB, but he claimed that "as hard as I tried to catch all the errors," DDB was "doing things that you could not possibly foresee." In September 2006, DDB used an outdated application, and Trotman wrote that "I'm not pointing fingers because I also missed the mistake . . . ."

On September 21, 2006, Jeannie Wilson, a manager in the SCE department that was responsible for processing customer applications for the summer discount plan, complained to Rowey and Black that Trotman was allowing too many errors by DDB on the marketing materials, and that his failure to catch those errors caused the department serious processing problems. Wilson questioned whether, "[c]onsidering how much we all have riding on the campaigns, [we] should . . . keep [Trotman] focused on this work." After receiving Wilson's e-mail, Black spoke with Rowey and recommended that Trotman be immediately removed from managing the summer discount plan because of Wilson's concerns and because of Trotman's failure to catch DDB's mistakes before they appeared in the final product. Rowey concurred, and Black assigned the summer discount plan to another employee who was able to devote most of her time to the project.

A few days later, on September 28, 2006, Trotman complained to SCE's ethics department that he was unfairly removed from managing the summer discount plan because of DDB's mistakes and that he believed he was being "set up to take the fall for our vendor's mistakes," quoting Black as having said that, "if there is another mistake on this project, even I'm going to get a pink slip." On October 11, 2006, Trotman called the ethics department "helpline." The "helpline" is owned and managed by a third-party vendor whose personnel are responsible for processing calls and providing a summary of each call to SCE's ethics department for review.

Trotman made the call to report harassment and retaliation by Black and Rowey since the conclusion of the investigation into his February 2006 complaint about Kiner and to report and to ensure SCE knew about "the DDB relationship with Julie Rowey," which Trotman characterized as "a personal relationship outside of work" with Robin Burns, DDB's representative. (Trotman claims that in the helpline call he also complained "about DDB overcharging [SCE] and [Rowey] authorizing payment and how that was rate payer fraud[,]" and that "when [Rowey] pays for DDB's mistakes, that means [SCE] is paying for DDB's mistakes, and that's overcharging rate payers and that's considered rate payer fraud." The third-party vendor's summary of Trotman's call does not include this allegation.)

SCE's equal opportunity (EO) department met with Trotman shortly after his helpline call to discuss the complaints he made to the ethics department. After the meeting, the EO department decided to investigate Trotman's claims that Black unfairly removed him from the summer discount plan and that she yelled at him and blamed him for mistakes that were not his. Dobson interviewed Trotman, Black, Wilson, and three others. Dobson did not interview Rowey or Kiner. Dobson determined that Trotman's allegations of retaliation by Black could not be corroborated and that he was removed from the DDB project (the summer discount plan) at the request of a client manager (Wilson), who said she had lost confidence in Trotman's ability to manage DDB and ensure the quality of their final product.

Trotman's conflict of interest allegations about Rowey's relationship with DDB representative Robin Burns were not investigated by the EO department.

3. Trotman's assignment to the Enterprise Resource Project effective in February 2007.

In November 2006, Kiner decided to assign Trotman to the Enterprise Resource Project (ERP), a large-scale project to integrate SCE's computer-based processes in one common platform. The project represented one of SCE's primary goals for 2007 and 2008. SCE records show that as of September 2008, 207 non-IT (information technology) employees were selected from across the company to work on ERP as a temporary work assignment; 127 of these employees were placed into their temporary assignments (like Trotman) without having to compete for the position.

Before assigning Trotman, Kiner had been informed by an ERP manager of an emerging issue concerning the adequacy of resources dedicated to the ERP in connection with energy efficiency programs and programs for low income customers. Kiner discussed the issue with Gene Rodrigues, the director of energy efficiency programs. They decided that energy efficiency personnel were too pressed by other business needs to fully participate in the ERP; that it was critical to assign someone with knowledge of the energy efficiency programs and with understanding of functions, such as marketing and application processing, that support those programs; and that an information technology background was not required because the ERP team already had information technology resources.

Kiner and Rodrigues discussed possible candidates and determined that Trotman had the necessary qualifications. Kiner contacted Anna Aguilar, a manager in SCE's human resources department, to inquire whether Trotman could be placed on a temporary work assignment devoted to the ERP, and Aguilar said he could be temporarily assigned for up to 18 months. Kiner consulted Rowey, who agreed the assignment made sense, especially since Trotman's time had been freed up as a result of his removal from managing the summer discount plan. Trotman was then placed on

a 12-month temporary work assignment, reporting to Herb Moses, beginning on February 1, 2007.[1]

4. Trotman's ensuing complaints.

Rowey and Rodrigues met with Trotman on January 16, 2007 to explain the new assignment.[2] Trotman did not object to the transfer when Rowey told him about it, but in February 2007, SCE was notified by the United States Department of Labor that Trotman had filed a complaint alleging discriminatory employment practices in violation of the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1514A). Trotman alleged in the Sarbanes-Oxley complaint that he was demoted to the ERP assignment shortly after filing a claim with SCE's ethics department about an alleged conflict of interest between Rowey and an outside service provider (DDB Worldwide).

Trotman also filed two complaints with the Department of Fair Employment and Housing. The first, on January 18, 2007, alleged he was demoted, harassed and unfairly evaluated by Kiner because of his race. He filed another complaint on December 27, 2007, alleging continued harassment and retaliation by Kiner, Rowey and Black for reporting and protesting discrimination and other violations of law. He requested and received immediate right to sue notices for both complaints, and filed this lawsuit on January 18, 2008, against SCE, Kiner, Rowey and Black. Trotman alleged causes of action for race discrimination, harassment, and retaliation in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940,

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[1] At the end of the 12-month assignment, Trotman's temporary assignment was twice extended for additional three-month periods at Moses's request. Trotman was returned to his previous position in the customer experience management department on August 1, 2008.

[2] Rowey did not sign the documentation confirming Trotman's temporary work assignment until April 2007 because SCE's human resources department "failed to inform [her] that [she] needed to complete any paperwork with respect to Trotman's [temporary work assignment] until that time."

subds. (a), (h) & (j)) and public policy, and also asserted claims for failure to prevent discrimination (Gov. Code, § 12940, subd. (k)) and for defamation.

SCE filed a motion for summary judgment, asserting that Trotman could not establish a prima facie case of race discrimination or retaliation because no adverse employment action was taken against him, and that he could not establish that he suffered from a hostile work environment because of his race. In addition to the evidence already recited, SCE produced evidence that Trotman had never been disciplined during his more than 10 years of employment with SCE and, based on positive performance reviews, has received a year-end bonus and a merit-based pay raise every year he has worked for SCE, including during the time he was on the temporary assignment he characterizes as a demotion.

Trotman received consistent employment evaluations indicating he was "meeting expectations," both before and after the 2002 to 2006 time period during which he reported to Rowey and Black. His performance evaluations by his managers for the years before he began reporting to Rowey and Black showed an overall performance rating of "4" out of "7" (ratings "3" through "5" mean the employee is meeting expectations), as does his performance evaluation by Herb Moses for 2007, after he was transferred to the ERP. In 2002 and 2004, Rowey rated Trotman a "5" out of "7"; in 2003, Rowey rated him "6" out of "7" (exceeding expectations). In 2005 and 2006, Black rated Trotman a "4."[3] In addition, Kiner explained that Trotman was one of hundreds of employees from across the company chosen to work temporarily on the ERP initiative, and expressed his opinion that Trotman had "better advancement opportunities within the Company as a result of working on the ERP."

SCE also produced evidence with respect to Trotman's "whistle-blowing" retaliation claim, pointing out that (1) Rowey did not learn Trotman was alleging a conflict of interest between herself and DDB representative Robin Burns until

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[3] Trotman believed he deserved scores of 5 or 6 for the years 2002 through 2006.

February of 2007, when she was notified of the Sarbanes-Oxley charge filed by Trotman. Similarly, Black did not learn of Trotman's allegations of "rate-payer fraud" and conflict of interest until well after he filed the Sarbanes-Oxley charge. Likewise Kiner, when he made the decision in November 2006 to assign Trotman to the ERP, was not aware of the complaint Trotman had made to the ethics department in September 2006 or of Trotman's October 11, 2006, call to the department's helpline. In addition, Rowey declared she had no personal relationship with Robin Burns outside of work; she first met Burns when she worked at the Los Angeles Times, which did business with DDB Worldwide; and she had never done anything social with Burns outside of work.

In his opposition to SCE's motion, Trotman argued that SCE failed to carry its burden on summary judgment, so "the burden has not shifted to [Trotman] to show the existence of a triable issue of material fact"; that "because [Trotman] has direct evidence of a discriminatory motive, (racist comments), the [*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792] analysis does not apply"; and that in any event Trotman (who relied principally on his own declaration and deposition testimony) showed "a multitude of triable issues of fact . . . ."

The trial court disagreed, granting summary adjudication of Trotman's discrimination, harassment, retaliation, and failure to prevent discrimination claims. The trial court found Trotman did not and could not demonstrate that he suffered any adverse employment action, and that his opposition on that issue was "based solely on speculation, opinion lacking in foundation, and unsupported conclusions." As to Trotman's racial harassment claim, the two "Nigook" comments and the Hawaiian dance parody did not constitute harassment sufficiently severe or pervasive to create an abusive work environment. And as to Trotman's claim of retaliation in violation of public policy, the evidence was undisputed that the decision-makers who took Trotman off the summer discount plan and who transferred Trotman to the ERP were unaware of his conflict-of-interest complaints when they made those decisions.

Judgment was entered[4] and Trotman filed a timely appeal.

DISCUSSION

The rules on summary judgment are well settled. A defendant moving for summary judgment need only "'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; Code Civ. Proc., § 437c, subd. (p)(2).) Summary judgment is proper if the moving party would prevail at trial without submission of any issue of material fact to a trier of fact. (25 Cal.4th at p. 855.) We review the trial court's ruling on a motion for summary judgment de novo.

1. Trotman's retaliation and discrimination claims under the FEHA.

To establish a prima facie case of retaliation under the FEHA, Trotman was required to show he engaged in a "protected activity," SCE subjected him to an adverse employment action, and a causal link existed between the protected activity and SCE's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) To establish a prima face case of race discrimination, Trotman likewise had to show he suffered "an adverse employment action, such as termination, demotion, or denial of an available job . . . ." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.)[5] If a plaintiff establishes a prima facie case of retaliation or discrimination, the employer must offer a legitimate reason for the adverse

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[4] The trial court denied summary adjudication of Trotman's defamation claim, but Trotman then dismissed that claim without prejudice and judgment was entered on the remaining claims.

[5] "The specific elements of a prima facie case may vary depending on the particular facts," but generally the plaintiff "must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 355.)

employment action, and if the employer does so, the presumption of retaliation or discrimination disappears, and the burden shifts back to the employee to prove intentional retaliation or discriminatory motive. (*Yanowitz*, at p. 1042; *Guz*, at pp. 355-356.)

Here, the trial court found that Trotman could not establish an essential element of his FEHA claims of retaliation and race discrimination: an adverse employment action. We find no basis to rule otherwise.

An adverse employment action "must materially affect the terms, conditions, or privileges of employment to be actionable . . . ." (*Yanowitz*, 36 Cal.4th at p. 1052.) "Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions" of the FEHA. (*Yanowitz, supra*, 36 Cal. 4th at pp. 1054-1055 ["a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment"].)

SCE produced evidence that Trotman was never disciplined, received consistent performance reviews before and after the events at issue, received merit increases in pay and bonuses throughout his employment, and was temporarily assigned to a significant project along with hundreds of other SCE employees. In response, Trotman produced only his own deposition testimony and his declaration (much of which was ruled inadmissible, rulings not contested in Trotman's opening brief on appeal), which the trial court properly characterized as "speculation, opinion lacking in

foundation, and unsupported conclusions."[6] Trotman stated, for example, that his transfer to the ERP was a demotion and the "kiss of death" to his career at SCE, that his transfer was "permanent" (despite SCE's evidence that it was, in fact, temporary), and that criticisms of his job performance on the summer discount plan "resulted from Wilson's influence" and were "unfair, critical and false," and so on. He produced, as the trial court observed, not even "a scintilla of evidence" to support his claims of demotion or a career-ending transfer. (See *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 393 [a transfer "is not an adverse action simply because the plaintiff finds it to be 'personally humiliating'"; a plaintiff who is made to undertake a lateral transfer in which he suffers no reduction in pay or benefits does not suffer an actionable injury "unless there are some other materially adverse consequences . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm'"; "'[m]ere idiosyncrasies of personal preference are not sufficient to state an injury'"].)

Trotman insists that he produced evidence of adverse employment action, citing *Yanowitz* for the proposition that "a series of separate retaliatory acts collectively may constitute an 'adverse employment action' even if some or all of the component acts might not be individually actionable." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1058.) Trotman then proceeds to cite Dobson's February 2006 report, which he says contains a "plethora of evidence of abusive conduct motivated by racial animus" reported by various witnesses interviewed by Dobson. (This conduct includes, for example, the "Nigook" comments, and witness statements that Kiner "looked for any opportunity to 'stick it' to Trotman' . . . .") But none of this conduct is evidence of "a series of

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6 Trotman claims in his reply brief that the trial court abused its discretion in sustaining "nearly all of [SCE's] evidentiary objections." We do not consider points raised for the first time in a reply brief """unless good reason is shown for failure to present them before."""" (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

separate retaliatory acts" (*Yanowitz*, at p. 1058) because there is no indication that *any* of it occurred after Trotman engaged in protected activity in February 2006.[7]

In sum, because there was no evidence of any adverse employment action, Trotman cannot establish a prima facie case of discrimination in the terms, conditions or privileges of employment based on his race, or of retaliation for engaging in protected activity under the FEHA.

2. Trotman's racial harassment claim.

"One form of employment discrimination is harassment on the basis of race or national origin." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129 (*Aguilar*); Gov. Code, § 12940, subd. (j)(1) [it is an unlawful employment practice "[f]or an employer . . . or any other person, because of race . . . [or] national origin . . . to harass an employee"].) Harassment includes "'[v]erbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the [FEHA].'" (*Aguilar*, at p. 129.) In a sexual harassment case, the Supreme Court has held that "an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462, citing *Aguilar*, at p. 130 [racial harassment].) The plaintiff "'must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee . . . .'" (*Aguilar*, at pp. 130-131.) Harassment "'cannot be occasional, isolated, sporadic, or trivial[;] rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature.'" (*Aguilar*, at p. 131.) The working environment is to be evaluated in light of the totality

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[7] The same is true of Trotman's claim that he was "demoted" in 2002 when a transfer resulting in a lower job classification allegedly resulted in his no longer being eligible for the bonus associated with his previous job classification.

of the circumstances; these may include "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" (*Miller*, at p. 462.)

Here, the trial court concluded that the two "Nigook" comments did not constitute actionable racial harassment as a matter of law (because Trotman did not hear the comments and was not aware of them until several years after they were made), and the Hawaiian dance parody (which occurred before 2001 and lasted only "a few seconds") did not constitute harassment sufficiently severe or pervasive to be actionable. Again, we cannot disagree with the trial court's conclusion. While we do not countenance the use of racial epithets or slurs in the workplace, however rare, the law requires that, to be actionable, such behavior must show "'a concerted pattern of harassment of a repeated, routine or a generalized nature.'" (*Aguilar, supra*, 21 Cal.4th at p. 131.) There is simply no evidence that Trotman endured racial harassment of a "repeated, routine or a generalized nature."

Trotman protests that it is error to consider only the "Nigook" comments and the Hawaiian dance parody in assessing the severity or pervasiveness of the racial harassment, and that a hostile work environment may exist even if some of the hostility is directed at other people. (See *Cruz v. Coach Stores, Inc.* (2d Cir. 2000) 202 F.3d 560, 570 (*Cruz*) ["[n]or must offensive remarks or behavior be directed at individuals who are members of the plaintiff's own protected class"; "[r]emarks targeting members of the other minorities, for example, may contribute to the overall hostility of the working environment for a minority employee"].) Trotman then cites Dobson's report of his interviews with other employees, who told Dobson, for example, that Kiner had made off-color jokes about Latinos, Native Americans, and African Americans; that in conversations with a white supervisor, Kiner would question whether the supervisor's employees, who were all minorities, were capable of doing their jobs; that Kiner told stories about his Mexican maid stealing his shoes; and that Kiner was "standoffish and 'cold'" toward Trotman and two other African

American employees. Trotman also points to statements in Dobson's report from other employees to the effect that Kiner treated Trotman badly, for example, that Kiner "'went after Mr. Trotman [] with a vengeance . . . .'" (In the last example, Trotman omits a pertinent portion of the employee's statement; Dobson's report actually says that Sheila Lee said that Kiner "went after Mr. Trotman *and Mr. Cromie* [who is White] 'with a vengeance.'") (Emphasis added.)

Notably, Trotman produced no evidence confirming the hearsay statements that appear in Dobson's report, no evidence of the frequency of the conduct alleged and no evidence as to when Trotman became aware of the various incidents alleged. (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519, 521 [incidents that a plaintiff does not witness and of which he is not aware "cannot affect his or her perception of the hostility of the work environment"; "mere workplace gossip is not a substitute for proof"; rather "[e]vidence of harassment of others, and of a plaintiff's awareness of that harassment, is subject to the limitations of the hearsay rule. It is not a substitute for direct testimony by the victims of those acts, or by witnesses to those acts"].) Moreover, a reading of Dobson's report makes it difficult to reach any conclusion other than the one Dobson reached: that while some people said Kiner treated Trotman unfairly, the same people said he treated others, non-African Americans, unfairly as well, and that "none of the examples shared during the investigation [were] newer than that [at least three years ago]."

In short, "[i]n order to survive summary judgment on a claim of hostile work environment harassment, a plaintiff must produce evidence that 'the workplace is permeated with "discriminatory intimidation, ridicule, and insult," that is "sufficiently severe or pervasive to alter the conditions of the victim's employment."'" (*Cruz, supra*, 202 F.3d at p. 570; see *Yanowitz, supra*, 36 Cal.4th at pp. 1052-1053.) This Trotman has not done, and accordingly, summary adjudication was properly granted on his racial harassment claim.

3. Trotman's claim of retaliation in violation of public policy.

In his third cause of action for retaliation, Trotman also alleged that SCE violated the public policies embodied in Labor Code section 1102.5 and in the Sarbanes-Oxley Act of 2002 by retaliating against him for his "whistle-blowing" activities.[8] Trotman claims that he "blew the whistle on his superiors" and "was retaliated against because he complained about a potential conflict of interest between SCE and its advertising agency [DDB Worldwide]." But, in addition to proving that he suffered an "unfavorable personnel action" (the equivalent of an adverse employment action), Trotman must show that the employer knew he engaged in the protected activity (i.e., complaining about the alleged conflict of interest). (*Allen v. Administrative Review Bd.* (5th Cir. 2008) 514 F.3d 468, 475-476 & fn. 2.)

Here, as the trial court pointed out, the evidence was undisputed that, when Black removed Trotman from the summer discount plan on September 25, 2006, Trotman had not yet complained to the ethics department or to the government about the alleged conflict of interest. And when Kiner and Rodrigues decided in November 2006 to assign Trotman to the ERP, they were likewise unaware of Trotman's conflict of interest claims. Rowey, Kiner and Rodrigues did not know of his complaints until the Department of Labor notified SCE and Rowey of the Sarbanes-Oxley charge in

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[8] Labor Code section 1102.5, subdivision (b), provides that an employer may not retaliate against an employee "for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." The Sarbanes-Oxley Act of 2002 provides "whistleblower" protection for employees of publicly traded companies, which may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" who "provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation" concerning conduct that the employee "reasonably believes constitutes a violation of . . . any provision of Federal law relating to fraud against shareholders . . . ." (18 U.S.C. § 1514A(a)(1).)

February 2007. Consequently, Trotman cannot support his claims of retaliation based on his alleged whistle-blowing activities.[9]

DISPOSITION

The judgment is affirmed. Southern California Edison Company, Seth Kiner, Julie Rowey, and Melodee Black are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

We concur:

BIGELOW, P. J.

FLIER, J.

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[9] Because Trotman can prove none of his discrimination, harassment and retaliation claims, there is no basis for his cause of action for failure to prevent discrimination.